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EXAMINER

STEPHENS, JACQUELINE F

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte LORI TASSONE HOLMES, MICHAEL JOHN NIEMEYER,
LAWRENCE HOWELL SAWYER and ROBERT ALAN STEVENS

Appeal 2009-009203
Application 09/939,535
Technology Center 3700

Before JENNIFER D. BAHR, STEFAN STAICOVICI, and
FRED A. SILVERBERG, *Administrative Patent Judges*.

SILVERBERG, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Lori Tassone Holmes et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 43, 69, 70 and 72-77². We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

THE INVENTION

Appellants' claimed invention is directed to a thin multilayer absorbent material having a high fluid absorption capacity (Spec. 5:8-11).

Claim 43, reproduced below, is representative of the subject matter on appeal.

43. An absorbent garment, comprising:
a chassis defining a waist opening and first and second leg openings;
the chassis including at least a liquid-permeable body side liner, an absorbent assembly and a substantially liquid-impermeable outer cover layer;
wherein the absorbent assembly includes a single continuous length of a drum-formed upper layer of pulp fluff combined with between 20 and 80 wt% superabsorbent material, an air-laid lower layer of pulp fluff combined with between 10 and 80 wt% superabsorbent material, the lower layer has a density equal to a density of the upper layer, the absorbent assembly has a thickness in a range of between 0.5 and 7.5 millimeters and an absorbent capacity between about 14 and 40 grams 0.9 w/v% saline solution per gram of absorbent material; and the lower layer comprises a plurality of separate pieces placed in desired locations adjacent to the continuous length of the upper layer of the absorbent assembly.

² The rejections of claims 26, 57, 58, 60-63, 65 and 68 are not part of this appeal, as the Examiner indicated that the claims are allowed (Ans. 7).

THE REJECTION

The following rejection by the Examiner is before us for review:

Claims 43, 69, 70 and 72-77 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Everett (WO 99/17695, published Apr. 15, 1999) in view of Osborn (5,484,430, issued Jan. 16, 1996).

ISSUE

The issue before us is whether the Examiner erred in concluding that the combined teachings of Everett and Osborn would have led a person having ordinary skill in the art to an absorbent garment having a single continuous length upper layer and a lower layer comprising separate pieces, as called for in independent claim 43 (Reply Br. 3, App. Br. 7).

ANALYSIS

Independent claim 43 calls for, *inter alia*, “the absorbent assembly includes a single continuous length of a drum-formed upper layer . . . and the lower layer comprises a plurality of separate pieces placed in desired locations adjacent to the continuous length of the upper layer of the absorbent assembly.”

Appellants contend that there is “no suggestion or motivation . . . to produce an absorbent structure in which one layer is discontinuous and the other layer is not.” (App. Br. 7, see also Reply Br. 3).

The Examiner found that Everett (1) describes an absorbent garment comprising an absorbent assembly, the absorbent assembly having an upper layer 48 and a lower layer 50 (Ans. 4), and (2) does not describe that the

lower layer comprises a plurality of separate pieces placed in a desired location of the absorbent assembly (Ans. 5).

In particular, Everett describes an absorbent garment article, such as a diaper 20 (p. 14, ll. 24-26, and figs. 1, 1B); the article comprises a topsheet 24, a backsheet 22 and absorbent core 30 (p. 15, ll. 9-27); wherein the absorbent core 30 includes first primary absorbent layer 48, the outermost layer of the wrapsheet 28, and the components sandwiched between (p. 11, ll. 13-15). In Everett, Figure 1B shows primary layers 48 and 50 sandwiched between wrapsheet 28, and lower primary layer 50 located multiple layers below topsheet 24. Everett further describes that topsheet 24 presents a body-facing surface (p. 18, ll. 14-15). Everett still further describes that “[t]o limit any undesired movement of the high-absorbency material, the article can include an absorbent composite 26 having an over-wrap, such as wrap sheet 28, which is placed immediately adjacent and around the entire absorbent core 30” (p. 23, l. 26-p. 24, l. 7) (emphasis added).

The Examiner found that Osborn describes an absorbent product having a segmented core (Ans. 5).

In particular, Osborn describes a sanitary napkin 20 having a topsheet 22, a backsheet 24 and an absorbent core 26 intermediate the topsheet 22 and the backsheet 24 (col. 3, ll. 19-28); the core 26 may be divided into a plurality of segments 26' (col. 7, ll. 1-2). Osborn further describes that a three segmented core 26 is desirable because the body of the wearer may be divided into three anatomically shaped regions (col. 7, ll. 2-6). Osborn still further describes that “[c]learly a need exists for a sanitary napkin 20 which

can adapt to these three very distinct shapes of the wearer's body." (col. 7, ll. 13-15).

The Examiner concluded that "[o]ne of ordinary skill in the art would be motivated by the teachings of Osborn to modify the lower layer [50] to have a segmented core for the benefits taught in Osborn" (Ans. 5).

We find that the benefits taught in Osborn are to adapt the segmented core 26 to the wearer's body by movement of the segmented core 26.

We find that Everett describes limiting the movement of the core 30.

Since Everett describes limiting the movement of the core 30, and movement would be needed to provide the benefits taught by Osborn, we conclude that it would not have been obvious to a person having ordinary skill in the art to modify the teachings of Everett by the teachings of Osborn for the benefits taught in Osborn. *See In re Haruna*, 249 F.3d 1327, 1335 (Fed. Cir. 2001) ("A reference may be said to teach away when a person of ordinary skill, upon reading the reference, ... would be led in a direction divergent from the path that was taken by the applicant.").

Moreover, we find that since Everett's lower primary layer 50 is multiple layers below topsheet 24, it is speculative, at best, whether Everett's lower primary layer 50, if it were segmented, would conform to a wearer's body. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (holding that "rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.").

Accordingly, we are constrained to reverse the rejection of claim 43. Likewise, we are constrained to reverse the rejection of claims 69, 70 and 72-77, which depend from independent claim 43.

CONCLUSION

The Examiner has erred in concluding that the combined teachings of Everett and Osborn would have led a person having ordinary skill in the art to an absorbent garment having a single continuous length upper layer and a lower layer comprising separate pieces, as called for in independent claim 43.

DECISION

The decision of the Examiner to reject claims 43, 69, 70 and 72-77 is reversed.

REVERSED

mls

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